



STATE OF WASHINGTON  
DEPARTMENT OF ECOLOGY

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May 14, 2012

Mr. Gary Chandler  
Vice President, Governmental Affairs  
Association of Washington Business  
PO Box 658  
Olympia, WA 98502-0658

**RE: Fish Consumption Rates**

Dear Mr. Chandler:

Thank you for your interest in Ecology's work on updating the state's sediment and water quality standards and improving the compliance tools available to businesses under the Clean Water Act. I especially want to thank you for your response to my request for a joint meeting with tribes and Ecology on these issues. Your willingness to engage directly with tribes and your constructive approach contributed to a successful meeting on these challenging issues.

I have reviewed the questions in your April 19, 2012, letter and am providing responses to those questions below. I hope these responses address your primary concerns:

**Response to Questions from AWB Letter of April 19, 2012**

**Fish Consumption Rates Technical Support Document:**

*Will the Department commit to honoring our request to respond in writing to the science and technical comments it received on the TSD? If yes, can we expect to see the Department's written responses prior to the filing of the CR-102 for sediment management standards?*

Yes. Ecology is compiling and evaluating the written comments received on the TSD. We are now developing responses to those comments which will be incorporated into a written response. We expect to complete and publish the written response as part of the documentation for the proposed revisions to the Sediment Management Standards (SMS) Rule. From a timing standpoint, we plan to distribute the written response at the same time we publish the CR-102 on our website. This will allow the public to consider Ecology's response to key technical issues addressed in the TSD as they review the proposed SMS Rule revisions, regulatory analyses and policy documentation.

*Is it still true that the Department views the guidance document as merely guidance and not a rule or final agency guidance?*

It is still true that the TSD is not a rule or final agency action. However, Ecology does not consider the TSD to be a guidance document. Ecology prepared the TSD to support public review and discussion with the understanding that the public dialogue would inform Ecology's rulemaking decisions. Consequently, your question implies a role for this document that exceeds its intended purpose.



Ecology did receive several comments regarding creating a guidance document to address the fish consumption rate issue. Some people appeared to support an approach where Ecology would adopt guidance for establishing higher rates on a site-specific basis instead of adopting a default fish consumption rate through the rulemaking process.

Other people expressed concerns with such an approach. They stated that adopting a default fish consumption rate in a guidance document would circumvent the rulemaking requirements in the Administrative Procedures Act (APA). They stated that Ecology must comply with the APA requirements for significant legislative rules if the Department intends to uniformly apply the default fish consumption rate.

As noted below, Ecology has decided to proceed with formal rulemaking. Compliance with the APA is one factor that Ecology considered when deciding to include a default fish consumption rate in the SMS Rule. This issue will be discussed further in our written response to the public comments on the TSD.

*If the TSD is a guidance document, how does the Department intend to use the TSD to inform rulemaking?*

As stated above, the TSD is not a guidance document; it is a review of data and information about fish consumption in Washington. The TSD supports public review and discussion on this issue with the understanding that the public dialogue would inform Ecology's rulemaking decisions. We received numerous comments regarding the evaluation of the scientific and technical issues in the document. We are carefully evaluating those comments and we have entered into an Interagency Agreement with the University of Washington to help evaluate the statistical issues and questions raised during the public comment period.

Ecology is considering a wide range of scientific, policy and implementation issues when preparing the proposed SMS Rule revisions. Ecology is also preparing several documents to inform and support rulemaking decisions, including:

- The revised TSD is one document that will provide the scientific and technical foundation for the proposed SMS Rule revisions related to fish consumption rates.
- A policy support document that will describe key policy choices and the rationale for those choices.
- Regulatory analyses required under the APA, which will evaluate implementation costs and options.

*Is the Department willing to consider providing a 60-day public comment period on the revised TSD when it is released? If no, why not?*

Ecology is currently revising the TSD based on public review comments. The revised TSD will be posted on the Ecology website with other rulemaking documents. As noted above, the TSD supports discussions on issues associated with adopting a default fish consumption rate in the SMS Rule. People will have an opportunity to review all rulemaking documents and submit additional comments and documents for consideration, after Ecology files the CR-102 later this summer. Ecology does not believe an additional public comment period directly addressing the revised TSD is necessary.

**Sediment Management Standards:**

*Is the Department willing to move forward on the SMS rulemaking without incorporating a default FCR? If no, why not?*

In responding to this question, I believe it is important to provide some background on the early MTCA rulemaking efforts that faced similar issues. The MTCA cleanup standards were published in 1991. The MTCA standards were designed to avoid the "paralysis by analysis" approach embodied in the site-specific cleanup negotiations prevalent in the late 1980's. In particular, the MTCA Cleanup Rule contains many default exposure factors (including a fish consumption rate of 54 grams/day). Ecology adopted this approach to avoid the often large transaction costs and cleanup delays associated with site-specific negotiations on individual exposure factors. While there has been a great deal of standardization of risk assessment methods since the 1991 rule adoption, we continue to believe the current approach with default exposure factors helps to focus available resources on choosing and implementing cleanup actions for individual sites. This is particularly true for smaller sites where evaluation and negotiation costs can escalate to a point where they represent a significant percentage of total cleanup costs.

We now face a similar situation with contaminated sediments. As you may recall, Ecology has been criticized for the length of time it takes to complete sediment cleanup actions. The current site-specific decision making model contributes to those delays. It also results in increased evaluation costs, unpredictable and inequitable outcomes for both the public and the regulated community, and prolonged exposure to unhealthy levels of hazardous substances.

Evaluations and negotiations on fish consumption rates are not the only cause of cleanup delays. However, our experience at sediment cleanup sites indicates it is a significant factor. We believe that establishing a default fish consumption rate and a clear science-based approach for modifying the default value will reduce cleanup delays and produce better decisions.

We also acknowledge that finding an appropriate balance between site-specific flexibility and predictability is an important rulemaking consideration. We are continuing to evaluate the question of balance as we review the comments on the Preliminary Draft Revisions SMS Rule (November 2011) and TSD.

**Implementation Tools:**

*Assuming the Department moves forward on the SMS Rule and incorporates a default FCR, is the Department willing to delay the issuance of the SMS Rule until it has a full opportunity to develop appropriate implementation tools approved by the EPA?*

The SMS rules work is not directly impacted by the implementation tools. The implementation tools rule work is in anticipation of future work on the human health criteria in the state's Surface Water Quality Standards (SWQS). Work on the human health criteria is not scheduled to proceed until after the implementation tools rule is completed. My approach here has been to work with businesses, industry and municipalities on improving Clean Water Act compliance and implementation tools before we update our SWQS, which is likely to lead to more protective standards.

We are currently in the early phase of the implementation tools rulemaking in the Water Quality Standards for Surface Waters of the state of Washington, Chapter 173-201A WAC. Our current SMS

Rule revision schedule is to complete the rule this calendar year. Completion of the revisions to the SMS Rule is likely to precede the adoption and EPA approval of the implementation tools rulemaking for the SWQS because of the additional time needed to research and understand additional tools that the business community wants to include in the SWQS Rule, as well as to address concerns of other stakeholders.

*Is the Department committed to identifying mechanisms/tools that will facilitate the implementation of water quality standards in a manner that allows an NPDES permittee to be confident in compliance with Clean Water Act compliance?*

Ecology has identified implementation tools that we feel will provide the business community with a compliance path that will be effective for addressing legacy toxics over an extended period of time. We also continue to meet and communicate with members of your organization to explore additional ideas and concepts intended to provide practical and viable alternative compliance options, and are considering how these proposals achieve water quality standards and meet the legal requirements of the Clean Water Act.

#### **Human Health-Based Water Quality Criteria:**

*Is Washington required by the Clean Water Act to amend human health-based water quality criteria at this time? If so, which statutes or regulations require the Department to undertake this rulemaking?*

Washington cannot amend the state's current human health-based surface water quality criteria because the criteria are contained in federal rule. Additionally, Ecology is not currently adopting new human health-based surface water quality criteria into state rule. Rulemaking for human health-based surface water quality criteria is planned to begin in late 2012 or in 2013, which could lead to a final adoption date that is unlikely to be prior to 2014.

This schedule is the result of Washington's compliance with federal law and regulation, which requires states to conduct a public review of water quality standards at least once every three years:

CWA 303(c)(1) "The Governor of a State or the State water pollution control agency of such State shall from time to time (but at least once each three year period ...) hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards. Results of such review shall be made available to the Administrator."

40 CFR 131.20(a) State Review. "The State shall from time to time, but at least once every three years, hold public hearings for the purpose of reviewing applicable water quality standards, and, as appropriate, modifying and adopting standards..."

As required by federal law and regulation, Ecology held a public review of the standards (triennial review) during 2010-2011. That review addressed adoption of human health-based surface water quality criteria, and Ecology has included adoption of those criteria in its 5-year plan. In the triennial review process, numerous commenters pointed out that a fish consumption rate of 6.5 g/day for Washington State is simply not accurate and grossly underestimates the exposure that people in high fish consuming communities in Washington State have.

*Does the Department acknowledge that EPA guidance identifies human health-based water quality criteria based on a risk level range of  $1 \times 10^{-6}$  to  $1 \times 10^{-5}$  is an appropriate risk management goal for the general population as long as states and authorized tribes ensure that a risk to a more highly exposed*

*subgroup (sports fishers or subsistence fishers) does not exceed the  $1 \times 10^{-4}$  risk level? See Methodology for Deriving Ambient Water Quality Criteria for Human Health, EPA EPA-822-B-00-004, October 2000.*

Yes, this is consistent with Ecology's understanding and interpretation of the EPA 2000 guidance (page 2-6, referenced in the question above) on risk level ranges, and is consistent with information Ecology has communicated to the public. The question above also addresses the concept of a "highly exposed subgroup." When new human health-based surface water quality criteria are adopted in Washington, the issue of what constitutes a more "highly exposed subgroup" will be determined for purposes of water quality criteria. For example, current rulemaking in Maine is focusing on the 99th percentile of tribal consumption to reflect the highly exposed subgroup for purposes of application of the  $1 \times 10^{-4}$  risk level for human health criteria development for arsenic. We expect the interplay of risk level and characterization of the "highly exposed subgroup" to be an area of interest for many stakeholders and tribal nations.

**Significant Legislative Rule Evaluation:**

*Does the Department consider the significant legislative rule evaluation to be a final agency action?*

Ecology understands the term "significant legislative rule evaluation" to mean the requirements in RCW 34.05.328 related to the proposal and adoption of significant legislative rules. No, these evaluations are not agency actions; the rule adoption is the agency action.

We have concluded that the SMS Rule revisions represent a "Significant Legislative Rule" as defined under the APA. Ecology will fully comply with the APA requirements for adopting such rules. The requirements include, but are not limited to: a determination that the probable benefits of the rule are greater than its probable costs, an evaluation of alternatives to determine whether the proposed rule revisions represent the least burdensome alternative that will achieve the goals and objectives of the statute being implemented, and determination if the rule differs from any federal requirements and, if so, justification for the difference.

*Will the Department commit to providing the significant legislative rule evaluation coincident with the CR-102 to facilitate public review and comment?*

Ecology will fully comply with the APA which requires that agencies have a preliminary cost-benefit analysis available when the CR-102 is published. Ecology plans to also include the least burdensome alternatives analysis in that document. We plan to post these analyses on our web site with the rule proposal language at the start of the CR-102 public comment period. We will consider comments on the preliminary analyses when preparing the final rule revisions (CR-103), and completing any other required rule documentation. The final evaluations required by the APA will be completed when the final rule is adopted.

*Would the Department entertain a request to allow the public to contribute or participate in the development of the Department's significant legislative rule evaluation? As one example, the public may have ideas concerning alternatives to rulemaking that could accomplish the general goals and specific objectives of the statute, as required by the evaluation under RCW 34.05.328.*

Ecology has already received numerous suggestions on alternatives to rulemaking and issues to consider during the rulemaking. For example, several people provided copies of the cost-benefit analysis prepared by groups reviewing the Portland Harbor Superfund Project. We are presently considering this

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information as we work on the economic analyses. Ecology will publish a preliminary cost-benefit and least burdensome alternative analyses when we post the rule proposal (CR-102) on our web site. Interested parties and the public will have the opportunity to review and comment on these analyses. We will consider comments, and, as appropriate, make changes or updates to the final rule language and rule documentation, including the economic analyses.

*How will the Department incorporate the comments it receives from the public concerning the analysis of the costs and benefits of implementing new SMS and human health-based water quality criteria?*

Ecology will review all comments on the preliminary cost-benefit analysis and include responses to those comments in the concise explanatory statement. Where appropriate, Ecology will update the final economic analyses.

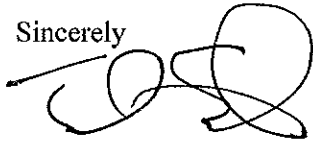
*How can the public provide the Department with credible alternative versions of the rule that would result in less burdensome outcomes for those required to comply with the rule?*

Ecology received several suggestions for rule alternatives during the Preliminary Draft Revisions SMS Rule (November 2011) public comment period. These included policy options (such as choice of target cancer risk level, incremental risks, population groups, etc.) and technical methods for managing uncertainty (such as defining a role for fish tissue testing). We are considering those suggestions as we prepare the proposed SMS Rule revisions (CR-102). We invite further comments and suggestions on the proposed SMS Rule revisions after the CR-102 is filed.

We also received several suggestions for non-rule alternatives. Most of these suggestions involve some type of guidance document, an approach which has been widely criticized from an APA standpoint.

I would be interested in discussing your concerns in greater detail and also in hearing your ideas on alternative versions of the SMS Rule revision to determine whether there are additional options that we should be considering. I look forward to our ongoing dialogue as we strive for sensible reductions of toxic pollution in Washington State.

Sincerely



Ted Sturdevant  
Director

cc: Governor Christine Gregoire  
Senator Lisa Brown  
Senator Mike Hewitt  
Representative Frank Chopp  
Representative Richard DeBolt  
Keith Phillips, Governor's Policy Office